No. 89-7272

SUPREME COURT
OF THE UNITED STATES

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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RONALD ALLEN HARMELIN,

Petitioner,

v

STATE OF MICHIGAN,

Respondent.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF FOR THE STATE OF MICHIGAN AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

WHETHER MICHIGAN'S MANDATORY LIFE SENTENCE WITHOUT PAROLE FOR POSSESSION OF A CONTROLLED SUBSTANCE IN AN AMOUNT OF 650 GRAMS OR MORE IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

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INTEREST OF THE STATE OF MICHIGAN

This case presents the question whether a Michigan statute mandating a life sentence without parole for possession of a controlled substance in the amount of 650 grams or more imposes cruel and unusual punishment under the Eighth Amendment. The State of Michigan has a compelling interest in combating drug trafficking in order to reduce drug related crime, drug addiction and related problems. One form the State Legislature has chosen to attack these problems is to enact statutory provisions requiring convicted drug offenders to be sentenced to mandatory prison terms or mandatory minimum terms. The mandatory life sentence without parole for possession of cocaine in an amount involving 650 or more grams is the sentence at issue in this case. Mich. Comp. Laws 333.7403(2)(a)(i).

SUMMARY OF ARGUMENT

Since 1978, drug related crime and related concerns have exploded on the national and local fronts. In 1989 Detroit, Michigan, had a murder rate of 60.0 per 100,000 population, while Washington, D.C., led the nation with a rate of 72.0. Nationally recognized criminologists place much of the blame for this extraordinary level and degree of violence on the illicit drug trade. [Carolyn S. Korneck, Associated Press, Washington, D.C., 8-4-90].

In 1978, the Michigan Legislature amended the Controlled Substances Act of 1971, to mandate prison terms for sale or possession of 50 grams or more of illegal drugs. This amendment specifically exempted first time violations for possession of schedule 1 or 2 drugs (opiates and cocaine) in amounts over

225 grams from an existing option of probation. Recodified as part of the Public Health Code (Part 74. Offenses and Penalties) 1978 PA 368 (imd. eff. May 17, 1978), the mandatory life without parole provisions were as follows:

a. MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i) delivery or possession with intent to deliver controlled substance mixtures in amounts of 650 grams or more.

b. MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i) possession only; 650 grams or more

c. MCL 333.7413(a); MSA 14.7413(1) delivery or possession of more than 50 grams on a second controlled substances offense.

Because this case involves a challenge to a legislatively imposed mandatory life sentence without parole, as opposed to one involving judicial discretion, the focus of this brief is on the appropriate standard for

judicial review of the constitutionality of legislatively mandated sentences.

ARGUMENT

THE PROPORTIONALITY TEST FOR REVIEW OF INDIVIDUALIZED SENTENCES IS NOT AN APPROPRIATE STANDARD TO REVIEW THE CONSTITUTIONALITY OF A MANDATORILY IMPOSED SENTENCE WHICH BYPASSES JUDICIAL DISCRETION.

The Eighth Amendment necessarily limits "the power of those entrusted with the criminal law function of government." Whitley v Albers, 475 US 312, 318 (1986), citing Ingraham v Wright, 430 US 651, 664 (1977). Thus, the primary focus of the Eighth Amendment is on the potential for governmental abuse of its prosecutorial powers. Browning-Ferris Industries, Inc v Kelco Disposal, Inc, 492 US ___, 106 L Ed 2d 219, 233 (1989).

The legal principle underlying the Eighth Amendment's prohibition against cruel and

unusual punishment is historically rooted in English common law jurisprudence and is well documented. As described in Ingraham v Wright, supra, 430 US at 664:

> "The English version ... was intended to curb the excesses of English judges under the reign of James II ... as a reaction to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 ... or to the perjury prosecution of Titus Oates in the same year." [footnote omitted].

The legal framework to guide Eighth Amendment analysis of the cruel and unusual punishment clause is more diffuse. In part, this is due to the difficulty in defining the term "cruel and unusual," Wilkerson v Utah, 99 US 130 (1878), and in part due to the historical rise of indeterminate sentencing policies based on changing penological theory approximately a century ago. At that time, the philosophy of penology changed from

legislatively specified, fixed, periods of incarceration to one employing judicial discretion in formulating sentences. United States v Grayson, 438 US 41, 45-46 (1978). The underlying premise for this direction was that the sentence should fit the offender because of the desirable social goal of rehabilitation. Id., 46. See Cummins v People, 42 Mich 142, 144; 3 NW 305 (1879); Cf. Weems v United States, 217 US 349 (1910) (the scope of the Eighth Amendment's prohibition against cruel and unusual punishment is not static, but acquires meaning as public opinion becomes enlightened by a humane justice).

The resulting historical shift from fixed sentences to indeterminate sentencing schemes "delegated almost unfettered discretion to the sentencing judge to determine what the

sentence would be within the customarily wide range so selected ...". Mistretta v United States, 488 US ___; 102 L Ed 2d 714, at 726 (1989); Cf. People v Coles, 417 Mich 523, 533 (1983) ("A sentence reflecting undue emphasis on revenge or one imposed pursuant to a local sentencing policy which removes the trial court's discretion to individualize sentences is infirm." [footnote omitted]).

Review of discretionary, indeterminate sentences necessitated criteria to determine when a judicially imposed sentence was cruel and unusual punishment. As epitomized in Solem v Helm, 463 US 277 (1983), these criteria are: 1) the gravity of the offense and harshness of the penalty; 2) comparing the sentence received with sentences received by other criminals in the same jurisdiction; and 3) comparison with sentences received for

commission of the same crime in other jurisdictions. There is no doubt that the Helm criteria are rooted in the principle of individualized sentencing, as stated by the Court:

> "The inherent nature of our federal system and the need for individualized sentencing decision result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment ..." 463 US at 290, n 17.
> [Emphasis added]

Due to substantial evidence showing that individualized sentencing frequently resulted in unjustified disparity in sentences, winds of change have swept across penological theories during the last two decades. Additionally, the underlying rationale for social rehabilitation of criminal offenders within a prison setting was subject to serious question. Prisons themselves have

become "more concerned with security, status maintenance, and population control." SENTENCING IN MICHIGAN, Report of the Michigan Felony Sentencing Project, July 1979, at 8-9.[1] One result has been a shift toward determinate sentences which provide certainty, eliminate disparities and fulfill broader societal objectives such as deterrence or incapacitation.[2]

The legal framework which developed in the almost universal context of Eighth

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[1]Pertinent portions of this Report have been lodged with the Clerk of the Court.

[2]By Administrative Order 1984-1, 418 Mich lxxx (1984); Administrative Order 1985-2, 420 Mich xii (1985); Administrative Order 1988-4, 430 Mich xxxi (1988), sentencing judges in Michigan are required to use the Michigan Felony Sentencing Guidelines for listed offenses. The recommended minimum sentence range is not, however, mandatory. MCL 333.7403(2)(a)(i) is exempt from these Guidelines.

Amendment analysis of individual sentences does not readily lend itself to a determination of the constitutional validity of these newer mandatory legislative schemes. By its nature, the Helm standard infringes deeply upon the doctrine of federalism. First, the subjective ranking of crimes as to their severity fails to take into account each states' independent authority to assign law enforcement priorities. Writing for the dissent in Helm, Chief Justice Burger recognized this infringement stating that, "[L]egislatures are far better equipped than we are to balance the competing penal and public interests and to draw the eventually arbitrary lines between appropriate sentences for different crimes." 463 US at 314. Second, the use of Helm criteria infringes federalism by comparison between states as to treatment of similar offenders. This effects

a least common denominator approach since some individual states will always have the distinction of being in the forefront, or in a backwater, of law enforcement efforts. See Hutto v Davis, 454 US 370, 373, n 2 (1982). Third, the proportionality theory which " ... requires a nexus between the punishment imposed and the defendant's blameworthiness," Enmund v Florida, 458 US 782, 825 (1982) (J. O'Connor, dissenting), has integrity only when the sentence is tailored to the individual offender. Thus, the proportionality review of mandatory sentences, involves a direct intrusion on the states' authority to define their criminal offenses since it assumes that federal courts are better able to make such a judgment.

Under these circumstances, amicus questions the efficacy of the Helm criteria

as a means of evaluating the constitutionality of the mandatory punishment at issue in this case.

A. MANDATORY PENALTIES NECESSARILY REJECT THE CONCEPT OF INDIVIDUALIZED SENTENCING WHICH FORMS THE HISTORIC PREMISE UNDERLYING PROPORTIONALITY REVIEW.

By any measure, drug trafficking and drug use are a critical threat to the health and welfare not only to Michigan's citizens, but to the nation's citizens.[3] According to recent statistics compiled by the National Institute on Drugs and Abuse (NIDA) and the Michigan Department of Public Health, 60% of the 305 homicides which occurred through

[3]Washington, D.C. has the dubious distinction of being referred to as the nation's murder capital. It has been described as a city under seige from within by drug traffickers and their hit men. Newsweek, March 13, 1989, at 16; Washington Post, April 4, 1989 at A15.

May 31, 1990, in Detroit, Michigan were drug related and 32, or 10%, involved youths 17 years old or younger. Drug Abuse Trend Update, Detroit/Wayne County, Michigan (unpaginated report).[4] Cocaine was the primary drug of choice and was related to 28% of hospital emergency room admissions. Id. Very serious health related problems are directly implicated. The number of syphilis cases increased by 48% as a result of trading sex for drugs, usually cocaine. Of reported AIDS cases wherein intravenous drug use was the sole risk factor, 18% were male and 62% female. Id. The impact on children under school age is particularly grave. Forty percent of newborns at one Detroit hospital were prenatally exposed to cocaine or heroin. Ann

[4]The complete document has been lodged with the Clerk of the Court.

Arbor News, August 26, 1990, Special Report, A1. At the national level, a 1988 study showed 11% or 375,000 newborns exposed prenatally to illicit drugs. Id., A15. The costs in terms of pain, suffering, and abandonment imposed on these "crack babies" is incalculable. The dollar costs in terms of medical care and education will be formidable.

The instant case involves the ultimate, non-capital, penalty of life imprisonment without parole. Unlike the sentence in Helm, supra, where judicial discretion was at issue, this sentence was mandated by statute. Thus, the present case squarely presents a challenge to legislative authority to impose a specific penalty for a serious drug offense. A mandatory, legislative sentence reflects a judgment that deterrence and pro-

tection of society requires a penalty which precludes an individualized sentence or the possibility of parole.

As preliminary considerations, outside of the death penalty context, this Court has never held that the Constitution requires individualized sentences. Lockett v Ohio, 438 US 586 (1978). Neither has this Court found an independent constitutional right to release from prison before the expiration of a minimum sentence. Greenholtz v Inmates of Nebraska Penal and Correctional Complex, 442 US 1 (1979); and see 18 USC §3351, et seq, wherein Congress recently abolished parole in its Sentence Reform Act, supra, 18 USC §§ 3551 et seq, 1984. In short, aside from the unique death penalty sanction,[5] the

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[5]Coker v Georgia, 433 US 584 (1987).

Constitution does not preclude mandatory, determinative sentences which omit judicial discretion.

The permissibility of the challenged Michigan scheme at issue here should not depend on application of the Helm criteria unless the Court determines that a criminal defendant subject to such penalty has a constitutional right to an individualized sentence promoting rehabilitation as its goal. This is so, because the only plausible existence for these criteria is that they are effective only where the sentencing judge exercises discretion regarding certain considerations. As determined by this Court during the heyday of indeterminate sentencing, the considerations for judges fashioning a sentence when a state adopts an individualized sentencing scheme included:

1) reformation of the offender; 2) protection of society; 3) disciplining the wrongdoers; and 4) deterrence of others from committing like offenses. Williams v New York, 337 US 241, 247 (1949). Michigan followed suit. People v Snow, 386 Mich 592; 194 NW2d 314 (1972), People v Coles, 417 Mich 523, 580; 339 NW2d 440 (1983).

Michigan's long and continued commitment to an indeterminate sentencing policy, however, did not deter the Michigan Legislature in 1978 from targeting major drug traffickers for mandatory punishments. In sum, the entire amendment mandated imprisonment for the sale of even small quantities of illegal drugs as well as removing an option of life time probation for sale of large quantities. The primary basis for this amendment was recognition of the serious harm

wreaked on society by the illicit drug trade and drug addiction. Legislative Analysis HB 4190 (5/17/78). The pervasiveness of illicit drug trafficking in Michigan, even in 1978, warranted a rejection of imprisonment as a means of promoting rehabilitation of convicted drug dealers since police repeatedly arrested the same dealers because they were so quickly returned to the streets by the justice system. Id. The resilience and growth of drug trafficking and drug use and its resistance to traditional law enforcement methods is now legendary. The resulting national debate appears to form two camps: one which views the problem as a drug war and advocates drastic measures such as martial law, the other which views the problem as a public health issue and advocates decriminalizing drug use. Newsweek, National Affairs, March 13, 1989,

at 21. While the debate continues, nationwide figures show that about 76,000 persons were convicted of drug trafficking in 1986 and served an average of 1 year 10 months imprisonment. Felony Sentences in State Courts, 1986, Bureau of Justice Statistics Bulletin, February, 1989. Federal drug offenders totaled 12,285 in the same year, a 134% increase from 1980, while the average sentence served was 3 years 3 months in prison. Federal Offenses and Offenders, DRUG LAW VIOLATORS, 1980-86, Bureau of Justice Statistics, Special Report, June, 1988.

Notwithstanding the seriousness of the drug problem, Michigan's mandatory drug sentences have been criticized as thwarting rehabilitative goals because they trap first offenders as well as the major drug traffickers. In keeping with that viewpoint,

the Sixth Circuit Court of Appeals in Young v Miller, 883 F2d 1276, 1285 (CA 6, 1989), while upholding the constitutionality of MCL 333.7401(2)(a)(i) (possession with intent to deliver 650 grams or more of heroin) under the Helm analysis, suggested that the "tiger trap may have sprung upon a sick kitten".

Such criticism is, at best, merely commentary on legislative debates concerning what criminal conduct should merit a mandatory penalty without regard to the individual characteristics of the offender. At worst, such criticism is based on certain assumptions which may or may not be true about major drug traffickers.[6] It simply does not follow that a first-time drug offender is also a first-time drug

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[6]Pertinent legislative analyses have been lodged with the Clerk of the Court.

trafficker. For example, as here, the person was carrying a telephone beeper and had a licensed gun strapped to his leg, as well as having over a pound of cocaine and a large amount of cash in his car trunk. Whether or not these facts support a conclusion that the person is a major drug dealer is a matter for debate.[7]

One recent study shows that seemingly respectable adults who are top-level dealers usually buy drugs by the kilo and sell by the pound. It also suggests that such drug traffickers have few business contacts and sell

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[7]In People v McCarthy, 113 Mich App 464, 470, n 5; 317 NW2d 659 (1982), the Michigan Court of Appeals dispelled any notion that 650 grams of a controlled substance was a trifling quantity, finding that the street value of 650 grams or more of cocaine or heroin had a street value of close to $1 million which resulted in large profits to the drug wholesaler.

only to a few persons well known to them. As a means of insulating themselves from arrest, they hire middlemen or "lieutenants" who keep control over the low-level dealers and customers. As a result, these individuals were less likely to have arrest records than were users who frequently committed crimes to support habits. See Chafken and Johnson, Characteristics of Different Types of Drug-Involved Offenders, Issues and Practices in Criminal Justice, p 17, February, 1988.

The above illustrates the dangers of judicial speculation as to the "appropriateness" of mandatory penalties in the context of individual cases. Sparse records and unsound assumptions can easily produce skewed results. It is submitted, then, that constitutional review of mandatory penalties requires an approach markedly

different from application of the subjective factor analysis of Helm.

Amicus thus offers the following formulation as an alternative which appropriately balances Eighth Amendment concerns and the state's interest in effective law enforcement.

B. A RATIONAL BASIS TEST IS NEEDED TO JUDGE WHETHER MANDATORY PENALTIES VIOLATE THE EIGHTH AMENDMENT.

The insidious spread and growth of drug trafficking and drug use is widespread. As noted recently by this Court in a Fourth Amendment drug testing context, "[T]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. We have adverted before to 'the veritable national crisis in law enforcement

caused by smuggling of illicit narcotics'." National Treasury Employees Union, et al v Von Raab, 489 US ___; 103 L Ed 2d 685, 704 (1989).

One obvious legislative response to the drug war has been increased reliance on mandatory penalties to increase the certainty of punishment for drug offenders. This trend has included the use of life imprisonment without parole.

Federal law now provides for a mandatory life sentence without parole for a third time drug offender. 21 USC §841(B)(1)(A), and life without parole for drug kingpins, 21 USC §848(e). Upheld, United States v Milburn, 836 F2d 419 (CA 8, 1988), cert den, ___ US ___; 108 S Ct 2880; 101 L Ed 2d 915 (1990); United States v Stewart, 820 F2d 1107 (CA 9, 1987), cert den, 484 US 867, 108 S Ct 192; 98

L Ed 2d 144 (1987) (no prior record). Louisiana imposes a mandatory life without parole sentence for heroin distribution. La Rev. Stat. Ann. Sec. 40.966 (West, 1986). Upheld Compton v Butler, 883 F2d 27 (CA 5, 1987); Terrebore v Butler, 848 F2d 500 (CA 5, 1988) (en banc) cert den, ___ US ___; 109 S Ct 1140; 103 L Ed 2d 201 (1989) rejecting a disproportionality argument.

Amicus contends that this case lends itself perfectly to a decision limiting the Helm proportionality theory to penalties involving a given criminal defendant's individualized sentence and to a mode of analysis which respects the state's autonomy. In principle, this Court has observed this distinction, noting in Rummel v Estelle, 445 US 263, 282 (1980), "that proportionality review was inimical to traditional notions of

federalism," and that the severity of a sentence was "largely within the discretion of the punishing jurisdiction." 445 US at 285. Cf. Solem v Helm, supra, 463 US 277, 290, n 17 (noting Rummel offered no guidance as to how courts were to determine an extreme sentence under the Eighth Amendment).

Amicus, therefore, suggests a different test to judge whether legislatively mandated penalties violate the Eighth Amendment. Under such a test, the reviewing court would determine whether the offense and punishment, as defined by the duly elected state legislature, lacked any rational basis. Stated otherwise, in order for a reviewing court to find that the legislative mandatory sentence was excessive in relation to its purpose, it would have to conclude that no rational state legislature considering the

nature of the offense and penological objectives would impose such a penalty.[8]

Adoption of a rational basis test appropriately accords a presumption of constitutionality to the judgments of individual state legislatures in this regard. Importantly, in the context of mandatory sentences the rational basis test will refocus the Eighth Amendment inquiry to the crime committed rather than on the individual committing it. It will emphasize society's interest in preventing and deterring criminal conduct the consequences of which extend far

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[8]Because the prosecution need only prove the amount of the substance to obtain a conviction, it is likely that additional facts which could further establish drug dealer status might be absent from the record. The fact that the legislature may have made it easier for the prosecution to obtain convictions in this area is not constitutionally impermissible. See McMillan v Pennsylvania, 477 US 79, 89, n 5 (1986).

beyond the immediate circumstances of the offense and any mitigating circumstances. To determine otherwise leads to the anomolous situation of judging mandatory sentences by criteria meant to ascertain individual culpability and to the least culpable offenders setting the ceiling on permissible penalties.

A mandatory life sentence without parole such as the one at issue in this case cannot be an excessive sentence under the Eighth Amendment. The illicit drug trade in Michigan is reprehensible and intolerable. "[C]ompared to the effect of drug traffic on society, isolated violent crimes may well be considered the lesser of two evils." People v Tanksley, 103 Mich App 268, 271 (1981) quoting State v Mallery, 364 So2d 1283, 1285 (La, 1978). The mandatory life penalty in

Michigan's scheme refers to the hard core addictive drugs, principally heroin and cocaine. The scheme recognizes the gravity of drug trafficking and the need to protect society from the major traffickers. Young v Miller, supra, 883 F2d at 1284 (1989). Given the appalling societal cost of the illicit drug trade, a rational legislature could readily conclude that a mandatory penalty of life without parole for drug trafficking effectuates appropriate penological and societal objectives. Their choice comports with the Eighth Amendment.